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No. 91-1603

In the Supreme Court of the United States

OCTOBER TERM, 1991

SAVE BARTON CREEK ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

FEDERAL HIGHWAY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether two state roadway projects are subject to the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-33) is reported at 950 F.2d 1129. The memorandum opinion of the district court (Pet. App. 35-68) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1992. A petition for rehearing was denied on February 24, 1992 (Pet. App. 69-70). The petition for a writ of certiorari was filed on April 3, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a suit by local environmental organizations to prevent construction of two highway projects, MoPac South and Segment 3, in the area of Austin, Texas, for failure to comply with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Basing its decision principally on the parties' extensive stipulations of fact, see Pet. App. 4, the district court ruled for petitioners and enjoined further construction on the highways. The court of appeals reversed and dissolved the injunction, holding that (1) the two highway projects were not "major Federal action[s]" requiring the preparation of an environmental impact statement (EIS) under NEPA and (2) the evidence failed to establish that the projects were improperly segmented from a contemplated beltway project around Austin, called the Austin Outer Loop (Loop).

1. MoPac South and Segment 3 are two roadways planned and now partially constructed in the Austin area. MoPac South is a 5.5-mile southern extension of a completed 16-mile north-south freeway located in West Austin known as the MoPac (so-called because it uses a right-of-way of the Missouri Pacific Railway). Its northern terminus is U.S. 290; its southern terminus is Segment 3. Pet. App. 37-38. Segment 3 is a section of a contemplated 84-mile beltway around the city, known as the Austin Outer Loop. *Ibid.*

Before the district court, the parties stipulated that the Federal Highway Administration (FHWA) had not committed funds or reimbursed the Texas Department of Transportation (the State) for planning, right-of-way acquisition, or development of any

segment of the Austin Outer Loop, and that the State had not requested funding for construction of any segment of the Loop. MoPac C.A. R.E. 85.* The parties also stipulated that FHWA has not approved the location of any segment of the Austin Outer Loop, and that, in 1988, the FHWA informed the State that the Austin Outer Loop was ineligible for federal funding. *Id.* at 93-94. The parties further stipulated that partial construction on MoPac South had proceeded up to that point without any federal funding, and that MoPac South was currently ineligible for federal funding. *Id.* at 94.

2. In July 1989, petitioners filed a complaint and a motion for a preliminary injunction alleging that respondents had violated NEPA by failing to prepare, or to require the preparation of, an EIS on MoPac South, Segment 3, or the Austin Outer Loop. Petitioners alleged, *inter alia*, that the non-federal respondents acted to evade the requirements of NEPA by improperly segmenting the state highway projects and using only state funds to construct environmentally sensitive segments traversing the Austin-area Edwards Aquifer. See Pet. App. 38. Petitioners argued that the Austin Outer Loop and MoPac South were "proposals" for "major Federal action" requiring the preparation of a comprehensive EIS under NEPA.

3. After a bench trial, the district court ruled that MoPac South and Segment 3 were subject to NEPA requirements. The court enjoined further construction of those projects pending compliance with the statute. Pet. App. 61. The district court's

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* MoPac C.A. R.E. refers to the Record Excerpts filed by respondent MoPac South Transportation Corporation in the court of appeals.

injunction rested on the legal conclusions that MoPac South and Segment 3 were integral parts of the Proposed Austin Outer Loop, and that the Austin Outer Loop Project as a whole was a "major Federal action." *Id.* at 51.

4. In reversing, the court of appeals rejected the district court's conclusion that MoPac South and Segment 3 constituted "proposal[s]" for "major Federal action" triggering the requirements of NEPA. The court observed that, because there had been no final, formal plan presented to the FHWA for approval, neither MoPac South nor Segment 3 had "yet acquired the status of a formal proposal requiring federal approval." Pet. App. 15. The court also considered a Council on Environmental Quality (CEQ) regulation defining "major Federal Action" as an action by nonfederal actors "which [is] potentially subject to Federal control and responsibility." *Id.* at 11, citing 40 C.F.R. 1508.18 (1991). The court noted (Pet. App. 12-13) that the potential for federal control and involvement in the projects at issue was minimal, observing that work on Segment 3 and MoPac South had

> progressed * * * to construction without FHWA approval or funding. Furthermore, state and local funding of these projects can never be reimbursed by the FHWA because the state did not obtain prior authorization from the FHWA * * * before awarding the construction contracts. * * * The state is simply building some highways for its own use.

The court concluded that, because "[t]he record is silent with regard to any meaningful federal participation or control exercised over the [projects] in this case," *id.* at 18, the projects "[did] not constitute nor are they a[] part of any project constituting 'major

Federal action' within the contemplation of [NEPA]." *Id.* at 21.

The court also ruled that the evidence failed to establish that the projects were improperly segmented from the contemplated Austin Outer Loop project. The court first noted that, since the highways in question were not part of any formal "proposal" for "major Federal action," Pet. App. 22-23, their segmentation could not constitute an improper attempt to avoid the requirements of NEPA. *Id.* at 24-25. In any event, the court decided, both MoPac South and Segment 3 met the four factor test for evaluating improper segmentation as set forth in the CEQ regulations implementing NEPA and adopted by the FHWA. Pet. App. 23-24 & n.15. The court determined that both highways at issue had "logical termini," possessed "substantial independent utility," and left open alternatives for construction and alignment of other segments of the larger project. *Id.* at 27-29. The court concluded that improper segmentation had not occurred. *Id.* at 30.

ARGUMENT

This case concerns the application to particular facts of well-established standards for whether a project triggers the requirements of NEPA. The court of appeals' resolution of the issue is consistent with the decisions of this Court and other courts of appeals, and does not merit this Court's review.

1. Petitioners do not directly challenge the court of appeals' conclusion that NEPA requirements do not apply to the highway projects at issue. Rather, petitioners' primary contention (Pet. 5-11, 14-20) is that, in rejecting the district court's conclusion that the projects are covered by NEPA, the Fifth Circuit usurped the district court's fact-finding role.

That contention is without merit. The question whether the highway projects are subject to the requirements of NEPA depends on whether, under the statute and pertinent regulations, the projects qualified as "proposal[s]," constituted "major Federal action," or were improperly segmented. These are questions of law. Here, the court of appeals concluded that the district court misapplied the legal standard for deciding whether NEPA requirements were triggered on the facts of this case. See Pet. App. 9 ("The district court's ruling that NEPA applies to MoPac South and Segment 3 stems from an erroneous legal conclusion that the Austin Outer Loop constitutes a 'proposal for major federal action.' "). The court of appeals' review of the district court's resolution of the legal issues did not require it to make any findings of fact. Indeed, there was no controversy as to the key facts found by the district court and stipulated by the parties. Clearly, the court of appeals' reliance upon the parties' stipulations of fact "d[id] not preclude [it] from making an independent determination as to the legal conclusions and inferences which should be drawn from them." *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961). In correcting the district court's erroneous application of the law to the facts, therefore, the court properly carried out its appellate function. See *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

2. Petitioners also err in suggesting (Pet. 12-16) that the Fifth Circuit failed to articulate clear legal standards for deciding when NEPA covers state-initiated projects. In rejecting the district court's finding that the projects in question were "proposal[s]" for "major Federal action," the court of appeals noted that "[c]ases finding 'federal' action emphasize authority to exercise discretion over out-

come." The court stated that "[t]he distinguishing feature" of federal action is the ability of a federal entity "to influence or control the [project's] outcome in material respects." Pet. App. 11 (quoting W. Rodgers, *Environmental Law* § 7.6, at 763 (1977)). The court concluded that, because the FHWA had little or no control over the projects at issue, those projects were not "major Federal action[s]." Likewise, in considering whether MoPac South and Segment 3 had been improperly segmented from the larger Austin Outer Loop project, the court applied the four factor test articulated in the pertinent CEQ regulation. After carefully analyzing the facts in the record as to each highway, the court concluded that the projects met all criteria for permissible segmentation and could therefore proceed without compliance with the requirements of NEPA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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